



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 107 OF 2014

PATRICK MUKIRI KABUNDU..... PLAINTIFF

VERSUS

EQUITY BANK LIMITED.....1ST DEFENDANT

PURPLE ROYAL AUCTIONEERS.....2ND DEFENDANT

JUDGMENT

1. By the plaint dated the 18/8/2014 and amended on 21/8/2014, the plaintiff pleads that he was granted credit facilities amounting to Kshs. 5,000,000/= by the 1st Defendant, on the terms that repayment of the loan was for a duration of 36 months beginning from 2/4/2013 to 2/4/2016. The suit property LR. MN I/1996, was offered as security of the said facility.

2. The dispute arose on 21/6/2014 when the 2nd Defendant served upon the Defendant a 45 days' notice demanding a sum of Kshs. 5,926,202.40 being the principal and interest accrued as at 17/6/2014. The Plaintiff alleges that the 1st and 2nd Defendant have grossly undervalued the suit property by using a forced sale value of Kshs.5,500,000/,yet as early as the year 2012 the suit property was worth Kshs.7,000,000/=and as at the year 2014, the suit property attracted a market value of kshs.10,000,000/=.The Plaintiff further alleges that his proposal to repay the subject loan was ignored by the 1st and 2nd Defendant as they went ahead to advertise the suit property for public auction on the 19/8/2014.

3. On those pleaded facts the plaintiff sought the following orders:

a) That the 1st and 2nd Defendant, by itself, agent, servant or workmen or otherwise, howsoever, be and is hereby restrained by an order of injunction from any alienating, selling conveyancing or transferring ownership or parting with possession of the suit property pending hearing and determination of this suit.

b) That the Defendant/Respondent purported sale on 19/8/2014 be declared NULL and Void for being unlawful, illegal and irregular for not complying with the provisions of Section 96(3) of the Land Act clause 10(2) of the document of charged dated 2/4/2013.

c) That the said property was grossly undervalued in contravention of Section 97(3) (a) (b).

d) That the Plaintiff requests for leave to amend or file any document or more evidence to support his case.

e) That costs be provided for.

4. When served, the 1st Defendant filed a statement of defense denying all the allegations in the amended plaint save for the descriptive paragraphs 1, 2, & 3. Even the particulars of special damages were denied and strict proof invited. The 1st Defendant further stated that the sale was above board, in accordance with the Land Act, the Auctioneers Act, the Auctioneers Rules 1997 and that the Plaintiff in offering the suit property as security accepted that in default of repayment, the suit property would be sold. The 1st Defendant also asserted that a registered value had valued the suit property at Kshs. 6,500,000/=. Therefore, he submitted, the suit ought to be struck out.

Evidence led by the parties

5. The hearing of the suit commenced on the 12/4/2017. On that day **PW1 linda Mshai** adopted her witness statement 15/12/2015. She testified and said that she was the wife to the Plaintiff and that she has never been served with a notification of sale or a statutory notice from

the 2nd Defendant yet she was entitled to service as per the clause 10.2 of the charge entered into between the 1st Defendant, her husband. She produced as exhibit 1 a copy of the charge document. She further testified that the valuation report by **Njihia Mwoka Rashid and company** was dated 25/10/2012 and had a forced sale value of Kshs. 5,300,000/= which was an under value. She produced as exhibit 1 a copy of the charge document.

6. On cross-examination, **PW1** stated that she consented to the obtaining of the loan by her husband and the suit property being offered as security but she was not aware that her husband had defaulted in the payment of the monthly instalments, and that she expected the notices to be sent to her postal address provided in the charge. She further confirmed that parcel 169 and 170 were dispatched from Nairobi to Mombasa and that she had no idea how much the suit property was sold for as she was not aware of the sale and did not take part in the public auction. She asked this Court to revoke the sale of the suit property as it was conducted contrary to Section 96 of the Land Act

7. **PW2**, the Plaintiff, adopted his witness statement filed in Court on the 18/8/2014. He testified and stated that under Section 90 of the Land Act, both the chargor and the spouse must to be served with statutory notices and that since the notices issued were returned by the postal office, his wife was never served with any notice at all. Therefore, he contended that the sale ought to be nullified and a declaration be made that there was no valuation leading to the sale.

8. On cross-examination, the Plaintiff acknowledged the debt, and that he had nothing in writing to demonstrate that he had requested for bank statements. He also confirmed that since the institution of this suit he has never paid any instalment towards the debt and that he was only challenging the sale.

9. Dw1, **Mr. Raphael Ngera**, was the 1st Defendant Branch Manager at the time of his testimony, adopted his witness statement filed in Court on the 16/5/2019. He testified stating that a Notice of intention to exercise statutory power of sale was issued and duly served on the Plaintiff and his spouse to the address provided by them and it was only after the notice elicited no response that the 1st Defendant instructed M/S Ultimate Valuers to conduct a valuation of the suit property in accordance with the provisions of the Land Act, leading to the issuance of a valuation report that indicated the market value of the suit property to be Kshs. 6,500,000/= and the forced value of the suit property as 4,875,000/=. Subsequently, the 2nd Defendant was instructed, who then issued the Plaintiff with a notification of sale, which was duly served upon the Plaintiff.

10. DW1 further averred that the 2nd Defendant on the 11/8/2014 and 18/8/2014 went on to advertise the suit property for sale after the Plaintiff failed to repay the outstanding loan and the public auction proceeded on the 19/8/2014 when the suit property was sold to the highest bidder for a sum of Kshs. 6,500,000/=and the purchaser has since paid 25% of the purchase price to the Plaintiff's loan account. Therefore, the process was above board.

11. On cross-examination, DW1 stated that instructions to the auctioneer are issued by the department of recoveries and that two demand notices dated 18/9/2013 and 17/1/2014 were issued and served upon the Plaintiff via registered post and a certificate of posting had been availed and he was not sure whether the aforementioned notices were returned to the bank as unclaimed. DW1 also stated that valuation of the suit property was conducted in 2014 as per the law and the 2nd Defendant had a copy of the said valuation.

12. **DW2, Lydiah Waweru** was the auctioneer trading as the 2nd Defendant adopted her witness statement filed in Court on the 16/5/2019 as her evidence in Chief. She testified and stated that she was instructed by the 1st Defendant on the 17/6.2014. On the 20/6/2014, she issued the Plaintiff with a 45 days' redemption notice and a Notification of sale pursuant to the Auctioneers rules 1997 and the notices were served personally upon the Plaintiff himself and the valuation used during the public auction was the one dated 6/8/2014.

13. On cross-examination, the 2nd Defendant stated that she had a current license at the time of the auction and that the Plaintiff owed the 1st Defendant a sum of Kshs. 5,926,202.40 at the time of the auction. The 2nd Defendant also confirmed that the notices issued by her were never served upon any other person other than the Plaintiff

Submissions by the parties

14. The plaintiff's submissions were filed in court on 18/11/2019 while those by the defendant are dated and filed in court on 15/11/2019. Those submissions were highlighted by the Plaintiff in person and the defendant's counsel on 3/2/2020. In those submissions the Plaintiff maintains that there is no written authority from the 1st Defendant authorizing the current advocate to Act on its behalf as the statement of defense filed by the 1st Defendant is not accompanied by a resolution from the 1st Defendant yet it is a limited liability company.

15. The Plaintiff further submitted that Section 96(2) (3) c of the Land Act requires that a notice of sell shall be served to various person including a spouse, which in this instance, the mandatory provision was not adhered to as admitted by the 2nd Defendant.

16. The Plaintiff also submitted that the notice of intention to exercise the statutory power of sale were not served upon him and his wife as there is evidence that the letters were returned back to the bank. Also, the Plaintiff submitted that the valuation of the suit property at the time of taking the loan was Kshs. 7 million and the said valuation dated 25/10/2012 undertaken by **Njihia Mwoka Rashid Co. Ltd** and it raises eyebrows how in two years the said land depreciated. Therefore, to him, the said sale was contrary to Section 97(1) and (2) of the Land Act and the same should not be allowed to stand.

17. **Mr. Ireri** Learned Counsel for the Defendant relied on the defendant's submissions filed on the 15/11/2019. On the issue of Notices, he submitted that the notices provided under Section 90 and 96 of the Land Act were issued and served as shown by the copies thereof and the certificate of posting duly exhibited showing that the notice were sent to the Plaintiff and his spouse by registered post to the very postal address which was reflected on the letter of offer and charge and it was upon the Plaintiff to prove that they never received the notices.

Counsel relied on the case of **Moses Kibieg Yator v Eco Bank Kenya Limited [2014]eKLR**.

18. On the issue of undervalue of the suit property, Counsel submitted that the Plaintiff had not tendered to the Court an independent valuation contradicting the valuation by M/S. Ultimate Valuers. Counsel relied on the decision in **Maithya vs Housing Finance Co. of Kenya and Anor (2003)1 144(CCK)**.

Issues, Analyses and Determination

19. The dispute here as pleaded and on the evidence led, the issues can only be those three as proposed by the plaintiff save that the first issue does not emerge from any of the pleadings and ought not to be improperly invited. It is of note that the defendants have taken no issue with those proposed issues, have not made own proposals and I do agree that only two substantive issues are sufficient to dispose of the suit between the parties. The issues are-

a) Whether the statutory notices were served upon the Plaintiff and his spouse as required under Section 96(3) of the Land Act.

b) Whether the valuation relied on by the 2nd Defendant was regular/valid.

Whether the statutory notices were served upon the Plaintiff and his spouse as required under Section 96(3) of the Land Act.

20. Before I go to the isolated issues, the challenge on the defendant's representation has invited heavy weather from the plaintiff and I need to comment on it even if it is not an issue discernible from the pleadings. In this case the 1st Defendant having been dragged into the suit by the Plaintiff, could only plead issues in response to the issues raised in the Plaintiff's Plaint and within the time limits dictated by the Rules. The defendant was not the originator and designer of the litigation and did not have the luxury of time to convene a board meeting to sanction the defense of the action.

21. Having said that, the plaintiff did not bother to anchor his challenge on any law. Having listened to the plaintiff, I get the impression that he was relying on the provisions of **Order 4 Rule 1(4)** of the **Civil Procedure Rules** which expressly provides that:

"Where the plaintiff is a corporation, the verifying affidavit shall be sworn by an officer of the company duly authorized under the seal of the company to do so."

22. There appears to be no indication, either in that provision or elsewhere in the Civil Procedure Rules, that such a requirement is applicable to corporate defendants. No authority on this particular point was brought to my attention by the Plaintiff to support the argument that, a defendant company once sued, is obliged to file a resolution of the company authorizing the appointment of counsel or giving authority to any of its officers to swear any necessary affidavit or to file necessary interlocutory applications. My research and basic appreciation of the law however displaces the plaintiff's challenge wholly.

23. In **Saraf Limited v Augusto Arduin [2016] eKLR** the court of Appeal settled the point thus:

"...We know of no law that makes it a requirement for a limited liability company that has been sued to furnish proof or to demonstrate that its Board of Directors or its shareholders have authorized it to defend the suit. If this were the law, logistical reasons would render it difficult or near impossible for companies to defend suits having regard to the strict time-lines within which appearance and defence must be filed."

24. Accordingly, I find that there is no provision in our statutes requiring a Defendant to furnish proof or to demonstrate that its Board of Directors have authorized a law firm or one of its officers to defend a suit against it.

Whether the statutory notices were served upon the Plaintiff and his spouse as required under Section 96(3) of the Land Act.

25. The requirement for service of notices leading to and paving way for realization of landed security has been given special emphasis under the Land Act 2012. One may as well say that the equity's darling, the right to redemption, met the better and more caring suitor in the Land Act 2012, compared to the previous legal regimes. In the current legal regime. it is obvious that that it is not only the borrower and registered owner to be served but every other person with a determinable interest over the land be it a possessory right, overriding interest of just usufructuary right and he whose rights would be affected by a change in proprietorship. The list of those to be served include, any lessor, lessee, national land commission, spouse who has given a consent to charge, a guarantor and any other person with the right to enter the land and extract *profits a prendre*.

26. I have perused all the notices issued and alleged to have been served. Having analyzed the chronology of events, I take the view that the need for notice under Section 96(2) of the Land Act mandates that the Bank cannot exercise its power to sell the charged property until at least 40 days have lapsed. The Plaintiff and his spouse were allegedly served with the 40 days' notice dated 27/1/2014 on the 5/2/2014, via registered post to the postal address that was provide by the Plaintiff in the loan agreement (P.O. Box 84666-80100) and as captured in the annexed certificate of posting dated 5/2/2014.

27. It is noteworthy that the Plaintiff has not disowned fact that registered postal address to which the notices of intention to sell dated 27/1/2014 were dispatched to belong to hi and the spouse. The cause of disagreement is that his spouse and he never received the same.

To support his contention, the Plaintiff produced a document showing that the dispatched letters, reg. 169 and 170, were returned to the 1st Defendant on the 5/5/2014 as unclaimed.

28. From the evidence, I find that the notices dated 27/1/2014 were dispatched by registered post addressed to the Plaintiff at registered address and that the packet containing the said notices was never collected by the Plaintiff or his spouse but was returned by the post office to the 1st Defendant on 5/5/2014 as having been “unclaimed.” While I note that no explanation has been offered by the Plaintiff why the letters were never claimed, the evidence that has not been rebutted is that the mail was returned and never reached the addressee. If the letters were never delivered, then there cannot have been service of the mandatory notice. I therefore hold that, on a balance of probabilities, the plaintiff has proved that the requirement for service of the notice of sale was never effected. If not so effected, then the right to sell had not accrued and any sale purportedly ensuing was void and cannot be sanctioned by the court.

29. In **Nyangilo Ochieng & Another v Kenya Commercial Bank, Court of Appeal at Kisumu, Civil Appeal No. 148 of 1995 (1996)** eKLR the Court of Appeal stated as follows :-

“It is for the chargee to make sure that there is compliance with the requirements of s.74 (1) of the Registered Land Act. That burden is not in any manner on the chargor. Once the chargor alleges non-receipt of the statutory notice it is for the chargee to prove that such notice was in fact sent”.

30. The import of the above case law cited is that failure to issue and serve a statutory notice upon the persons mandated amounts to a clog on the person’s equity of redemption. The chargor’s spouse rights granted by statute must always be protected despite default by the chargor. She must also be afforded reasonable opportunity to settle the debt and redeem her land. In the instant case it is clear that the defendant, as the person obligated to prove service, failed to show that the requisite notices were indeed served upon the Plaintiff’s spouse instead it was admitted by the 2nd Defendant that no such notice was served. Therefore, I reiterate that any sale purportedly conducted in violation of the law is null and void and cannot be allowed to stand. It is set aside.

Whether the valuation relied on by the 2nd Defendant was in conformity with the law?

31. The plaintiff’s other contention was that there had been gross understatement of the value of the suit property by the defendants, to the plaintiff the property was advertised for sale with a forced value of Kshs. 5,500,000/= based on a valuation dated 8/2/2011 when **Njihia Muoka Rashid**, retained by the plaintiff, had returned a higher forced sale value.

32. To counter and answer that complaint, the defendants through DW1 confirmed that M/S. Ultimate Valuers had been instructed to conduct a valuation of the suit property. A valuation report dated 5/8/2014 was produced by DW1, indicating that the market value of the suit property to be Kshs. 6,500,000/= and the forced value of the suit property as 4,875,000/=.

33. Section 97(1) and (2) of the Land Act, embodies the duty of care owed to the chargor by the chargee. The duty therein is no more than *“to obtain the best price reasonably obtainable at the time of sale.”* Apart from this, there is no other duty imposed. Section 97 (2) requires the chargee to undertake a valuation of the property. The purpose of the valuation is to enable the chargee discharge the duty of care required by Section 97 of the Act. The said provisions provide that:

Duty of chargee exercising power of sale.

97. (1) A chargee who exercises a power to sell the charged land, including the exercise of the power to sell in pursuance of an order of a court, owes a duty of care to the chargor, any guarantor of the whole or any part of the sums advanced to the chargor, any chargee under a subsequent charge or under a lien to obtain the best price reasonably obtainable at the time of sale.

(2) A chargee shall, before exercising the right of sale, ensure that a forced sale valuation is undertaken by a valuer.”

34. Gikonyo, J, in **Koileken Ole Kipolonka Orumos vs. Mellech Engineering & Construction Limited & 2 Others (2018) eKLR** held that:

“...the forced sale valuation is not only for purposes of carrying through the public auction or solely for recovering the debt, but reinforces the rights of the charger to have reasonable value for his property. That is why the duty under Section 97(2) of the Land Act is statutory and obligatory. It is not left to the whims of the charge and its agents especially the auctioneers”.

35. Similarly, in **Palmy Company Limited vs Consolidated Bank of Kenya Limited [2014] eKLR**. the Court observed as follows:

“The purpose of a valuation under Section 97(2) of the Land Act is twofold. The first one is to obtain the best price reasonably obtainable at the time of the sale, thus protecting the right of the Chargor to property...the second one is to prevent unscrupulous

Chargee from selling the charged property at a price which is peppercorn or not comparable to interests in land of the same character and quality.”

36. I have examined and carefully considered all the rival arguments on this issue. I take the view that the Plaintiff’s only quarrel with the defendant was fastened upon the alleged lack of a recent valuation and the allegation that the report used had suppressed the true value of the property. I find that there was indeed a recent valuation carried out in August 2014 which returned the following values:

1. Open market value at Kshs. 6,500,000/=

2. Mortgage value at Kshs.5,200,000/=

Forced sale Value.....Kshs.4,875,000/=

37. In the case of *Palmy Company Limited vs Consolidated Bank of Kenya Limited (supra)* the Court stated as follows:

“The onus of establishing on prima facie basis, that the Applicant’s right has been infringed by the Respondent by failing to discharge the duty of care under section 97(1) of the Land Act lies on the Applicant.”

And went on to state that:

“The court needs cogent evidence and material in order to say that prima facie, there has been an undervaluation of the suit property which is an infringement of section 97(2) of the Land Act by the Respondent as to entitle the court to call for an explanation or rebuttal from the Respondent.

38. I note that the Plaintiff has not tabled a current and independent report to give his version of what should be the value of the property. He has relied on a valuation that had been conducted way back in 2012 wherein the market value was placed at approximately Kshs 7 million while the forced sale value was put at approximately Kshs 5,300,000/=. That report cannot be the only basis to believe the plaintiff’s complaint. Unfortunately, the valuer who undertook the impugned valuation was not subjected to cross-examination so as to be able to ascertain what aspect were taken into consideration in arriving at the current market value. The report was produced by consent and I do take it that the plaintiff was content with the report or else he would have insisted on the maker being called.

39. I make the conclusion that there was no proof to the requisite standards that the property had been advertised and sold at gross-undervalue. I find no merit in that complaint.

40. Having found that the auction was a nullity for flouting the statutory requirements and it having emerged in evidence that the plaintiff remains in possession, I hereby set aside the auction. Consequently, the Plaintiff is entitled to the order of cancellation of the sale of the suit land pursuant to the purported auction of 19/8/2014. The parties have to go back to the position that they were in before the auction sale. This however does not erase the debt.

41. Because the 1st defendant is still owed, it retains its right of sale, and there having been a conceded default, it may proceed with the realization provided it issues and serves due notices of sale and causes the suit property to be valued and a reserve price ascertained.

42. On costs, it is my view that the sale has been nullified because it was poorly conducted by both the 1st Defendant and its agent the 2nd defendant. Therefore, the plaintiff deserves and is awarded the costs jointly and/or severally against both the 1st and 2nd defendants.

Dated and delivered at Mombasa this 8th day of May, 2020.

P J O OTIENO

JUDGE